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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File:

Office: Lima

Date: JUN 8 2001

IN RE: Petitioner:
Beneficiary:

Petition: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

IN BEHALF OF PETITIONER

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The visa petition to classify the beneficiary as an immediate relative was found not to be readily approvable by the Officer in Charge [REDACTED]. Therefore, the Officer in Charge properly served the petitioner with notice of intent to deny the visa petition, and his reasons therefore, and ultimately denied the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The Officer in Charge's decision states that the Petition to Classify Orphan as an Immediate Relative (Form I-600) was filed on September 6, 2000. The petitioner is a 40 year-old married citizen of the United States, who had one previous marriage. The beneficiary, who is presently 2 years old, was born in Lima, Peru, on October 18, 1998. The beneficiary was adopted in Lima, Peru, by the petitioners on August 28, 2000. The beneficiary's biological father, [REDACTED] and biological mother, [REDACTED] are still living and state that they are incapable of providing for the beneficiary's proper care, and therefore, have irrevocably released their child for emigration and adoption. The district director denied the petition after determining that the beneficiary does not meet the statutory definition of orphan since the evidence submitted did not show that the beneficiary had been abandoned.

On appeal, counsel requests oral argument. Oral argument is granted only in cases where cause is shown. It must be shown that a case involves unique facts or issues to law which cannot be adequately addressed in writing. In this case, no cause for oral argument has been shown. Consequently, counsel's request for oral argument is denied.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), defines orphan in pertinent part as:

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by an United States citizen and spouse jointly...who personally saw and observed the child prior to or during the adoption proceedings...

The regulation at 8 C.F.R. 204.3(b) states:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and

possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

The record contains a copy of the English translation of a court document entitled "Writ of Abandonment." This document contains the statement of [REDACTED] who states to the court that the beneficiary was given to her by a relative and has been her responsibility since the beneficiary was eight days old. She also states that she knows the biological parents, [REDACTED] and [REDACTED] and that the parents mentioned the difficult economic situation they are experiencing and their will that once the baby was born to give her to whoever will care for her. Considering this situation, [REDACTED] states that she volunteered to take care of the guarded child so the baby would not end in the hands of strange people. The biological parents reveal in their statement, which is also a part of this document, that the beneficiary has lived with their aunt, [REDACTED] from the age of eight days and that they gave her their child due to their poor economic situation. The biological parents also state that they have given their child on a volunteer and final basis and will not reclaim her later.

Guardianship was granted by the court to [REDACTED] on June 18, 1999. The relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the

foreign-sending country to act in such a capacity. The petitioner has not shown that [REDACTED] is authorized under the child welfare laws of the foreign-sending country to act in such a capacity.

Further, a Service inquiry revealed that the beneficiary's biological parents have been living together for 17 years. The inquiry also revealed that the beneficiary's guardian, [REDACTED] spoke with the beneficiary's biological parents in order to give the beneficiary up for adoption so that [REDACTED] brother could adopt her. The inquiry states that after the beneficiary was born, she was taken to [REDACTED] house until [REDACTED] brother finished the adoption procedures. This report was signed by the beneficiary's biological parents acknowledging that the contents of the report were true and correct.

The affidavit by [REDACTED] the petitioner's spouse, dated November 7, 2000 states that [REDACTED] was not used as a third party. The petitioner's spouse also states that the beneficiary was not relinquished or released by her biological parents to them, the adoptive parents. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. [REDACTED] 19 I&N Dec. 582 (BIA 1988). The petitioner's spouse's assertions have not been substantiated by credible evidence. Consequently, the petitioner has not established that the beneficiary is an "orphan" within the meaning of section 101(b)(1)(F) of the Act.

The burden of proof is on the petitioner to establish the beneficiary's eligibility for classification as an orphan. [REDACTED] 14 I&N Dec. 502 (BIA 1973); [REDACTED] 11 I&N 493 (BIA 1966); [REDACTED] 11 I&N Dec. 27 (BIA 1964); Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.